UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

January 17, 2003

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey and Thomas Knox were present.

Item #1. Approval of the Minutes of the December 13, 2002, Commission Meeting.

Commissioner Knox moved approval of the minutes.

Commissioner Downey seconded the motion.

There being no objection, the minutes were approved.

Item #2. Public Comment.

There was no public comment regarding matters not on the agenda.

Item #6. Adoption of Amendments to Regulation 18704.2: Determining Whether Directly or Indirectly Involved in a Governmental Decision: Interest in Real Property.

Assistant General Counsel John Wallace explained that the Commission merged the discussions of this regulation and the "small cities public generally" discussion at its September 5, 2002 meeting. The Commission did not have a full opportunity to consider this regulation at that time, and directed staff to notice the regulation. Staff did so and was presenting most of the same options that were presented in September.

Mr. Wallace explained that the Commission combined the 500' test with the other circumstances in which a public official's property is considered directly involved in a decision during its Phase 2 project. The intent was to put all tests that applied the same standard in a single regulation, but an ambiguity arose concerning the interpretation of the merged regulation. As a result, it has been perceived by the public as a narrowing of the 500' standard. Staff proposed to remedy the situation in the proposed regulation.

Chairman Getman recalled that the Commission did not object to the regulation during the September discussions.

Mr. Wallace explained that the town of Yountville submitted a comment letter regarding this item.

Chairman Getman noted that the Commission did not receive the letter until that morning and did not have time to review it.

Mr. Wallace explained that Yountville was asking that a special exception be included for small cities. He noted that the Commission decided in September that any exception should be in the "public generally" exception and not in one of the component parts of a conflict of interest, and staff supported that concept.

Karin Troedsson, from the town of Yountville, noted that they preferred to have the discussion after Commissioner Swanson arrived. She renewed her request that small jurisdictions obtain a clear standard of when they have conflicts of interest, and preferred that the standard be included in regulation 18704.2.

Ms. Troedsson stated that FPPC staff attended a recent Yountville Council meeting. She outlined the discussion at that meeting, noting that their mayor told staff he was uncomfortable with the "gray area" of the "public generally" exception. She explained that Yountville's public officials would recuse themselves from voting when they were unsure of whether they had a conflict of interest. The Council would often have to draw straws to determine who could vote on the issue, which she believed hindered their democratic process.

In response to a question, Ms. Troedsson explained that public officials were uncomfortable applying the exception of the "public generally" rule because 18707.2 requires public officials to go through a complex process. They have written to the FPPC many times requesting immunity letters so that they can be confident that they do not have a conflict. The FPPC has responded with advice letters that outline the rules, but has not provided immunity letters. She noted that public officials are reluctant to risk being fined by the FPPC.

Chairman Getman stated that advice letter #01-172 provided advice to the city.

Ms. Troedsson responded that the advice letter did not provide immunity to the mayor, so the mayor did not participate.

Chairman Getman observed that it was a formal advice letter.

General Counsel Menchaca agreed.

Chairman Getman noted that the chart indicated that the "public generally" exception requirements were met in that case, which had to do with a flood wall.

Ms. Menchaca agreed, noting that staff gave immunity to the council member.

Ms. Troedsson explained that another letter addressed a community hall project, and the council member did not participate even though she received an advice letter, because she did not feel that she had immunity. The councilmember did not participate in the floodwall project either, because she wanted to be told that she could participate without risk of prosecution by the FPPC.

Chairman Getman explained that the formal advice letter provides that assurance and it granted immunity on the vote.

Ms. Troedsson explained that she did not have that particular advice letter in front of her, and suggested that the discussion be postponed until Commissioner Swanson arrived so that she could review the letter.

Chairman Getman responded that it would be unnecessary because the Commission had already discussed the letter several times. She explained that agenda item #7 would provide additional discussion about whether there are specific elements of the "public generally" exception that need amending so that they are easier to apply. She recommended that the Commission confirm its previous decision not to provide a special accommodation for small jurisdictions in this regulation.

Chairman Getman moved approval of regulation 18704.2.

Commissioner Knox seconded the motion.

Commissioners Downey and Knox and Chairman Getman voted "aye". The motion carried by a vote of 3-0.

Item #7. Public Generally Exception for Small Jurisdictions: Repeal of Regulation 18707.3 and Discussion of Regulation 18707.1.

Commission Counsel Natalie Bocanegra explained that the Commission decided to repeal regulation 18707.3 at its last meeting, asking that small jurisdictions provide specific information regarding why the general "public generally" rule in regulation 18707.1 cannot be used by small jurisdictions. Staff received input from small jurisdictions, which was outlined in the staff memorandum.

Ms. Bocanegra discussed the comments received at a Yountville Town Council meeting, which she and Mr. Wallace attended. Mayor Holt commented that regulation 18707.1 did not give her enough comfort to participate in decisions under the "public generally" exception, and asked that the Commission consider the rationale underlying the "small jurisdiction" exception. Councilmember Knight emphasized the geographic differences between jurisdictions, noting that enforcement concerns should not overshadow the difficulties faced by small jurisdictions like Yountville. Sharon Stensis, editor of a Yountville periodical, believed that the FPPC should want persons with stakes in the community to vote, otherwise the democratic process is undermined.

Ms. Bocanegra noted that Michael Martello, from the League of California Cities, advised that repeal of 18707.3 would not result in any imminent dire consequences, but urged the Commission to keep an open mind with regard to Ms. Troedsson's concerns.

Ms. Bocanegra explained that the Act disqualifies officials who have a financial interest in a decision unless the effect of the official's economic interest is indistinguishable from the effect on the public generally. Staff analyzed past advice letters to see how the general rule would apply to facts previously analyzed under the small jurisdiction exception. Based on that review and comments from the public, staff recommended formal repeal of regulation 18707.3. She noted that staff would still be able to continue further examining the general rule if the Commission so desired.

Chairman Getman asked whether there were problems associated with applying the "public generally" rule to small jurisdictions.

Ms. Bocanegra stated that there were some public concerns about the complexity of applying the "general rule". However, that concern affected all jurisdictions, not just the small jurisdictions. There were concerns regarding data sources and how to do the counting required under the general rule, as well as how to tell whether a decision will have a substantially similar effect on a public official's property compared to the property of a "significant segment".

In response to a question, Ms. Bocanegra confirmed that the concerns affected all jurisdictions when the "public generally" exception was used.

Ms. Menchaca clarified that small jurisdictions may have less resources than large jurisdictions to use as data sources. Otherwise, the concerns would apply across-the-board.

Commissioner Knox stated that 18707.1(b)(1)(E) referred to exceptional circumstances and asked for an example of its application.

Ms. Menchaca stated that it may have been added following the Oakland fire, which affected a lot of homes but not enough to be considered a "significant segment". When public officials are trying to undertake major decisions about a particular area, the provision allowed for an exceptional circumstance that could be applied. Very few people asked about it.

Mr. Wallace recollected that the exceptional circumstances provision was included in the regulation in case the Commission believed that there was a very unusual circumstance under which a public official should be able to participate. He noted that there was a separate state of emergency regulation which dealt with the Oakland fire, but he believe that regulation 18707.1(b)(1)(E) was meant to cover circumstances that were not contemplated in other provisions. He did not believe that it had ever been used.

Commissioner Knox noted that it would be hard to rely on that provision without an advice letter. He stated that Yountville appeared to be reluctant to make a judgment that a decision affects properties in substantially the same manner without an advice letter. He asked whether other advice letters provided more specific criteria for that determination.

Ms. Bocanegra stated that the "substantially the same manner" test was factually based, and differed from situation to situation. Regulation 18707.1 currently provided that standard, but did

not address criteria or factors that may be considered. Staff was considering addressing that to deal with general plan decisions in the context of the "public generally" rule.

Ms. Menchaca added that the Commission discussed the issue when it considered adopting regulation 18707.9 (the "landlord-tenant" regulation). While addressing that regulation, staff asked the Commission whether the second prong of the test should be further defined, but the Commission decided not to do that at that time. She explained that it would be difficult to develop a set of rules that would work in all circumstances, including business interests and impacts on individuals. However, for that regulation, the Commission determined that those owners of three units or less would be deemed to be substantially similar. She did not know how often the regulation was applied, but noted that it is possible to come up with additional factors that may work.

Commissioner Knox asked whether the owner of a business on the one main street of a small town could vote to approve the paving of that street, when the paving would affect other businesses on the street in the same manner. He asked if the size of the business would affect whether the effect was substantially the same.

Mr. Wallace explained that there are exceptions within the materiality regulation that would find the effect to be immaterial. He noted that all advice letters are fact-based, and almost all cite the *Oglesby* opinion. Staff does not conduct an investigation when responding to advice letters, but instead relies on the facts provided by the requestor to determine materiality and forseeability. The same would be true for the "public generally" rule. He did not know whether many enforcement cases dealt with those types of issues.

Commissioner Knox stated that he was trying to discern what an overworked city attorney or volunteer public official would do when they must make an immediate decision about whether they can participate.

Chairman Getman responded that during Phase 2, city attorneys were very vocal at Commission meetings, and advised the Commission that they often found out about possible conflicts at the last minute before a meeting. However, they did not see this area as a problem because it was not hard to determine whether a decision would affect a segment in substantially the same way.

Ms. Menchaca stated that a majority of the "public generally" cases included statements such as, "The public official believes there is a similar effect," and noted that staff could not accept the public official's belief as sufficient criteria.

Ms. Troedsson observed that her jurisdiction did not participate in Phase 2 because they did not recognize the effects of the Phase 2 proposals, and added that no small jurisdictions participated in that process. She explained that there will be one or two conflicts on every significant land use decision in their small jurisdiction, and noted that their public officials do not feel comfortable taking the risk of participating. She responded that some of the terminology presented difficulties, noting that there were mobile home parks where people owned the mobile home but not the land underneath them. Some places in the regulations refer to "property owners" while others refer to "homeowners" or "households." She noted the example presented

at the December meeting wherein people lived in desert communities where there were communal rights and the location of their real property was in question.

Commissioner Knox asked whether a recurring problem with regard to the mobile home parks could be addressed in an advice letter.

Ms. Troedsson stated that no letter had been submitted requesting the advice because none of their current public officials live in the mobile home park. However, a candidate running for office lived in a mobile home park, and if that candidate wins the election advice will need to be sought.

In response to a question, Ms. Troedsson stated that the main concern of council members was that they did not feel comfortable operating in the gray area and were afraid of FPPC fines.

Commissioner Downey noted that a public official would normally ask counsel whether a conflict existed. He asked whether city counsel would more commonly seek an advice letter from the FPPC or simply give their own legal advice.

Ms. Troedsson responded that their advice does not shield public officials from prosecution from the FPPC. Most city attorneys will tell the public officials what the rule is, but will not advise them as to whether they should participate because of their own liability issues. She noted that she works through a law firm that has a contract with a city, while other cities may have in-house counsel. Her office would not offer the advice unless the answer was extremely clear.

Chairman Getman stated that the FPPC does not prosecute public officials who vote on an issue when they have a good-faith belief that they can vote and have submitted facts to the FPPC. She explained that Phase 1 and 2 were highly publicized, and staff went on the road all over the state of California, getting input for the projects. The Commission decided, after much public input, that trying to tailor the rules for the unique aspects of many different kinds of jurisdictions created more harm than good. They worked very closely with city attorneys, and finally agreed that one set of rules worked best. She could not understand why it was so hard, particularly in a small city where everyone knows everyone, to determine whether 10% of a public official's neighbors would be affected in substantially the same way by a decision. She noted that staff answers many advice letters a year, and are very good at working with individuals to help them provide the facts they need to provide an answer. She explained that the FPPC had an 800 number that can be called to get advice.

Chairman Getman summarized that the FPPC provides resources, and that a public official who receives a letter giving her immunity for a vote would not be prosecuted by the FPPC.

Ms. Troedsson agreed that staff worked very well with people in the local jurisdictions.

Commissioner Knox questioned whether the concern was whether they qualified for the "public generally" exception as it applied to specific decisions as they come up.

Ms. Troedsson stated that they are confused by the regulation and want the security of knowing that a conflict does not exist. She explained that an official with a real property interest within 400' of a restaurant that is trying to get a conditional use permit would have to determine if 10% of the real property owners of Yountville are similarly affected.

Ms. Troedsson asked whether the 10% would have to be within 400' of the property also, noting that in most cases 10% of the people would not live within 400' of the property.

Ms. Menchaca stated that this issue was addressed during Phase 2, and that the Commission decided to rescind previous advice providing that the segment within 300' would have to be affected exactly the same way at that time. Part of the issue appeared to be educating the public. In this case, a segment would not consider the 400' limitation. She explained that staff is aware of the issues and has addressed many of them. If small jurisdictions need more education about the regulations, staff would try to get that education to them.

Commissioner Downey noted that 18707.3 was adopted as a recognition of a special need for small jurisdictions. If the regulation is repealed and 18707.1 is not changed, he asked whether it was a reversal of a position taken when 18707.3 was adopted.

Chairman Getman responded that the special exception for small jurisdictions was needed when the rest of the rules were different. However, when the rules were simplified, fewer people were then subject to the conflict of interest rules and the Commission eliminated the need for the special exception.

Ms. Troedsson stated that the effect of the 500' rule change was to make it more difficult for small jurisdictions than it was in the past. She agreed with the Commission's past policy decision that special jurisdictions needed special rules. She requested that regulation 18707.3 be fixed, not repealed.

In response to a question, Chairman Getman responded that the biggest problem prior to Phase 2 was the gray area between 300' and 2500'.

Commissioner Downey noted that it was simplified for small jurisdictions.

Chairman Getman added that Phase 2 increased the number of circumstances in which there would be a finding of a presumption of a conflict. In those cases the "public generally" exception would need to be used in order to participate. It did require a little more work by the public official. However, in eliminating that "gray area" the Commission was saying that anyone outside that 500' circle did not have a conflict.

Chairman Getman explained that the Commission's job was to make sure that public officials with a conflict do not vote. They were not willing to say that someone who lives 500' away from property subject to a decision did not have a conflict. Since only 10% of the jurisdiction needed to be affected in a similar manner in order to meet the "public generally" exception, a lot fewer people need to be affected to meet the test. Chairman Getman did not think it inappropriate to disqualify an official whose property was within 400' of a subject property, when less than 10%

of the people were similarly affected, because it was likely that it would affect the official's financial interest in the property.

Chairman Getman explained that Yountville's request would result in a rule unlike any previous rule, because any financial interest beyond 300' of a subject property would be presumed to not be a conflict. She was not willing to support that change. She agreed that some accommodations could be explored to make the proof necessary to meet the "public generally" exception less burdensome.

Ms. Troedsson asked that 18707.3 not be repealed. She suggested that 18707.3 could be amended to include clearer rules addressing when a conflict does not exist, similar to regulation 18707.9. She believed a repeal of 18707.3 without addressing small jurisdictions in 18707.1 is a policy reversal, and noted that the Commission was doing it at a time when it was difficult for other cities to present their concerns.

Chairman Getman asked Ms. Troedsson how often she had appeared before the Commission on this issue.

Ms. Troedsson explained that she has been in contact with the Commission 1 ½ years, and that the possible repeal of 18707.3 was just brought to her attention in December of 2002.

Commissioner Downey complimented Ms. Troedsson on her efforts. He agreed with the Chairman, however, that a conflict in a small jurisdiction is the same as one in a large jurisdiction. He stated that the Commission was responsible for making sure that people with conflicts do not participate in the decision-making process. He agreed that the conflicts may arise more often in small jurisdictions, but noted that they were still conflicts. He supported the repeal of regulation 18707.3, and believed that it did not represent a change in policy for the Commission.

Chairman Getman agreed, noting that the Commission gave tremendous help to small jurisdictions during Phase 2. She stated that regulation 18707.3 was inapplicable under the current rules, and encouraged Ms. Troedsson to let the Commission know of any ways to ease the burdens of applying the "public generally" exception.

Chairman Getman moved that regulation 18707.3 be repealed.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox and Chairman Getman voted "aye." The motion carried by a vote of 3-0.

Chairman Getman encouraged Mr. Wallace to contact the small jurisdictions section of the League of California Cities to explore amending the "public generally exception" regulation to make it less burdensome.

In response to a question, Chairman Getman stated that staff could explore the issue while working on the "general plan" issues.

Item #8. Adoption of Amendments to Regulation 18991: Population Data Source for Audits of Campaign Reports and Statements of Local Candidates and Their Controlled Committees.

Commission Counsel Jennie Eddy presented the amendments to regulation 18991, noting that the regulation outlines the procedures for selecting local candidates and their controlled committees for audit by Franchise Tax Board. The amendment would change the source of data to be used to measure the population of local jurisdictions as part of the audit selection process. She explained that the amendments would correct the current inequitable audit pool selection process.

Ms. Eddy stated that the amendment would require the use of annual population data from the Department of Finance instead of the federal decennial census. Staff recommended adoption of the amendment because it would create an equitable audit pool selection for all cities and counties in the state of California.

Chairman Getman moved adoption of regulation 18991.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox and Chairman Getman voted "aye". The motion carried by a vote of 3-0.

Item #9. Review of Opinion Request Denied by the Executive Director, File No. O-02-348.

Chairman Getman announced that the review of the opinion request was withdrawn by the requestor. She noted that there are issues raised for the Commission because of the California Supreme Court's refusal to accept review on the *Davis* decision, and added that staff was actively analyzing those issues and will be presenting them to the Commission.

In response to a question, Ms. Menchaca stated that the issue is calendared for March 2003.

Chairman Getman noted that the pending *California Pro Life* case addresses some of the same issues, and staff may get further guidance from the court in that case.

In response to a question, Ms. Menchaca stated that the March 2003 discussion will be a pre-notice discussion.

Items #10 and #11.

There being no objection, the following items were approved on the consent calendar:

Item #10. In the Matter of Darryl M. See, FPPC No. 00/115.

Item #11. Failure to Timely File Late Contribution Reports - Proactive Program.

a. ***In the Matter of Allred Residential Property Company*, FPPC No. 2002-1017.** (2 counts.)

b. ***In the Matter of Caliber Collision Centers*, FPPC No. 2002-1022.** (1 count.)

c. ***In the Matter of Crossroads, LLC*, FPPC No. 2002-1025**. (1 count.)

d. ***In the Matter of James D. Falaschi*, FPPC No. 2002-1027.** (1 count.)

e. ***In the Matter of Terry Hartshorn*, FPPC No. 2002-1031.** (1 count.)

f. ***In the Matter of Stephen C. Sherrill*, FPPC No. 20020-716.** (1 count.)

g. ***In the Matter of Stanford Financial Group Company*, FPPC No. 2002-779.** (1 count.)

h. ***In the Matter of TIG Specialty Insurance*, FPPC No. 2002-1048.** (1 count.)

i. ***In the Matter of Lyle Turner*, FPPC No. 2002-1050.** (2 counts.)

j. ***In the Matter of Kenneth E. Weg*, FPPC No. 2002-1053.** (1 count.)

k. ***In the Matter of Geoffrey Y. Yang*, FPPC No. 2002-1054**. (1 count.)

Item #12. Executive Director's Report

Executive Director Mark Krausse announced that the Governor's proposed budget released Friday, January 10, 2003, eliminated 5 1/2 vacant positions from the FPPC budget (a $225,000 reduction). The proposal required approval by the Legislature. Mr. Krausse distributed copies of the proposed budget.

Item #13. Legislative Report

Mr. Krausse noted that staff received inquiries from Legislative offices regarding legislative ideas, but nothing was in print yet. Staff had meetings set up to see authors on Commission-sponsored bills.

In response to a question, Mr. Krausse stated that the Commission sent a list of items to the Legislature that the FPPC would like to have clarified in the statutes. The Committees are considering those items.

Item #14. Litigation Report

Chairman Getman announced that the Litigation Report would be taken under consent.

Ms. Menchaca noted that Tony Alperin, from the City of Los Angeles, requested depublication of the *Davis* case, not review, and that it should be corrected.

Item #5. Adoption of Amendment to the Rulemaking Process -- Regulation 18312:

Mr. Wallace explained that at the December 13, 2002 Commission meeting, staff recommended streamlining the rulemaking process by reducing the number of meetings held in connection with the adoption of regulations. Staff has revised the proposed amendment consistent with the Commission's decisions at the December meeting, and asked for Commission approval of the four decision points outlined in the staff memorandum.

Mr. Wallace explained that Decision point 1 was a codification of the interested persons meeting. Decision point 2 considered staff's recommendation that the definition of pre-notice hearings be retained. He noted that when the amendment was originally presented, the Commission was given the option of eliminating the pre-notice hearings. Both provisions have been modified to allow staff discretion to determine whether there is a need for additional meetings, or whether the regulation can be scheduled for adoption when it involves simple technical changes.

Mr. Wallace noted that Diane Fishburn, representing the California Political Attorneys Association, opposed the proposal because she believed that the Commission should make those decisions, not staff. He noted that the provision would not limit the authority of the Commission in any way, noting that the Commission will always make the final determination as to the number of meetings needed, either through the approval of the regulatory calendar or by directing staff to schedule more meetings.

Chairman Getman noted that the proposal suggests that staff could hold a hearing, which the Commission had not authorized.

Mr. Wallace agreed, and noted that staff would make a clarifying change to address that. He noted that staff made this proposal because they may not have time to put a meeting in the regulation calendar, and this would give them the discretion to set up the meeting for pre-notice or adoption.

Chairman Getman stated that the language of Decision 2 would then read, "The Commission may hold a pre-notice hearing on any regulation…" The rest of the language would remain the same.

Commissioner Downey suggested that the word "hold" be changed to "schedule."

Mr. Wallace responded that staff would be comfortable with that change, and noted staff believed there would be no real problem with staff initially setting up the number of meetings.

Chairman Getman agreed that the word "schedule" be used, noting that the same correction should be made in Decision 4.

Mr. Wallace agreed, noting that the word "hold" on page 4 line 2 should also be changed to "schedule."

Chairman Getman stated that the language of Decision 2 should read, "The Commission or Commission staff may schedule a pre-notice hearing on any regulation." She recommended that the language of Decision 4 read, "The Commission or Commission staff may schedule additional interested persons meetings, pre-notice hearings or adoption hearings."

Mr. Wallace explained that Decision 3 attempted to set a deadline for consideration of written comments in order to deal with the problem of last minute comments. He noted that Scott Hallabrin, from the Assembly Ethics Committee, commented that a section of the Administrative Procedures Act (APA), based on a 1981 Attorney General opinion, may preclude the Commission from setting a deadline. He did not believe that it was necessarily binding, but noted that the language was virtually identical to what was in the 1974 APA. Therefore, he believed the Commission should not risk making it an iron-clad deadline.

Commissioner Downey stated that the iron-clad part of the language would have prohibited the Commissioners from considering comments submitted late. He suggested that the language be changed to, "Interested persons wishing to submit written comment shall do so by ____."

Chairman Getman did not believe that the Commission could do that under the 1974 APA. The Commission is bound to accept those submissions.

Commissioner Knox noted that a person who appears to speak before the Commission may present a written document supporting their comments. If they can submit written comments the day of the meeting, persons mailing their comments should be able to send them the day of the meeting too.

Mr. Wallace noted that the AG opinion construed the same language to apply even in advance of the meeting.

Commissioner Knox pointed out the practical problem that the Commissioners do not have time to read the comments when they are submitted late.

Chairman Getman added that it is very burdensome on staff, because they too do not have the time to read the comments and analyze them for the Commissioners.

Mr. Wallace presented revised language that would delete the language "Written comments will not be considered that are submitted to the Commission later than" from the proposed regulation. The language, "Written comments should be submitted to the Commission no later than" would be substituted, followed by the language of Subdecisions 3A and 3B. He recommended that the language of Subdecision 3B, "unless they are given to the Commission as part of an oral presentation made at the hearing," be substituted with, "to ensure their delivery to the

Commissioners and afford them adequate time to fully consider the comments." This would not be a strict ban on late written comments, but reflects the reality that late comments are not likely to get a full review by the Commission. He distributed copies of the revised language to the Commission.

Commissioner Knox supported the revised language, and suggested that they be submitted by noon the business day preceding the day of the meeting. He believed that it would be notice to the public that they should get their comments in earlier.

Commissioner Downey noted that Government Code section 11425 requires that the FPPC consider all comments before making a decision, regardless of how late they arrive.

Chairman Getman stated that they must be considered.

Mr. Wallace stated that impossibility would be a defense for that provision, noting that if the comment arrives too late to be read then it cannot be considered.

Chairman Getman noted that it is a fluke in administrative law that, when a meeting is held in the morning, people can submit written comments up until 5:00 p.m. the day of the meeting that are a part of the rulemaking file.

In response to a question Mr. Wallace stated that the provision was a guideline. He noted that Ms. Fishburn acknowledged that the community understands the rules, but that it is good to have it printed on the agenda for people not familiar with the rules.

Commissioner Downey agreed that comments should be submitted by noon.

Scott Hallabrin commented that the language should not be kept in the regulation because it creates the idea that there is a hard deadline and because it would be most effective to put it on the agenda.

Chairman Getman noted that it has been on the agenda for three years.

Mr. Wallace noted that Diane Fishburn also commented that rule should be limited only to items up for adoption. Since the rule was being changed to a suggestion, Mr. Wallace recommended that it apply to every comment letter.

Chairman Getman suggested that the language be changed to read, "Written comments should be submitted to the Commission no later than 12:00 p.m. of the business day preceding the day of the hearing, to afford the Commissioners adequate time to fully consider the comments."

Commissioner Knox suggested that the language at the bottom of each month's agenda be changed to track that language.

Chairman Getman agreed.

Mr. Wallace stated that Decision point 4 reflects the Commission's practice to set additional meetings for items. Staff recommended that the Commission include the language in the regulation.

Chairman Getman moved adoption of the regulation with the noted changes.

Commissioner Knox seconded the motion.

Commissioners Downey and Knox and Chairman Getman voted "aye." The motion carried by a vote of 3-0.

The Commission adjourned for a break at 11:09 a.m.

The Commission reconvened at 11:16 a.m.

Item #4. Adoption of Amendment of Regulation 18225.7, Expenditures "Made At The Behest Of" a Candidate or Committee; Adoption of Regulation 18550.1, Independent And Coordinated Expenditures.

Senior Commission Counsel Larry Woodlock reviewed July and September Commission discussions regarding these proposed regulations. Staff presented proposed amendments to 18225.7, which had been modified to address the substantive concerns voiced by the Commission in September. Staff also drafted regulation 18550.1 which would interpret § 85500(b) for the Commission's consideration. Both regulations explain the concept of coordination and campaign spending and look very similar.

Mr. Woodlock stated that proposed regulation 18225.7(a) is the same as the current regulation. It defines "made at the behest of" with synonyms, while 18225.7(b) adds examples of conduct that will always be "at the behest of." He noted that there was no substantial controversy over the language the last time the Commission considered it.

Lance Olson, with the law firm of Olson, Hagel and Fishburn, stated that 18225.7(b) appears to make clear that a communication is "made at the behest" when certain activities occur, noting that the same language is repeated in the regulation describing an independent expenditure. He believed that the language does not belong in 18225.7(b). Regulation 18215(c)(4) currently exempts from the definition of "contribution" a communication that clearly identifies a candidate if it does not contain express advocacy, while the proposed regulation includes it as a contribution "made at the behest." He was concerned that there was a potential conflict between 18215(c)(4) and 18225.7(b). He noted that the only time it would be relevant would be in the application of § 85310, which requires the reporting of payments made at the behest of a candidate that do not contain express advocacy. If left in the regulation, he suggested that the language say that it is for the purpose of § 85310.

Commissioner Downey stated that 18225.7 is an attempt to define a particular term that appears in a number of statutes in the PRA. The language of 18225.7(b) will only apply to one or two of the statutes where the phrase "made at the behest of" occurs.

Mr. Olson agreed, observing that, even if it clearly identifies a candidate, and even if it is coordinated as defined in (b), it still will not constitute a contribution unless it contains express advocacy.

Mr. Olson agreed that the language should be in the independent expenditure regulation, but questioned why it should be in the definition of "at the behest." He supported giving guidance to the regulated community as to what an independent expenditure is, but was concerned because advice letters have interpreted the existing regulation and the new regulation would deviate from that advice.

Mr. Woodlock stated that regulation 18215(c)(4) addresses only candidates. The proposed regulation presents a parallel regulation for committees.

Mr. Olson responded that this has not been a problem for ballot measure committees. He questioned whether the proposed regulation would change the existing regulation's exemption from the definition of "contribution."

Chairman Getman stated that "made at the behest" is used in a number of circumstances, including behested payments and in-kind contributions. She believed it was important to provide guidance on independent expenditures, but clear guidance is made difficult because "made at the behest of" is used in a number of different contexts. Since the definition of "contribution" is not changed, there would not be a contribution if it does not include express advocacy. She asked whether it was affirmatively harmful or whether Mr. Olson was worried because it has not been done before.

Mr. Olson stated that it occurs in the definition of “contribution” and in § 85310, but he did not know that it was affirmatively harmful. He supported the regulation as long as it did not intend to change the basic notion that the absence of express advocacy, when there is a clearly identified candidate under the circumstance outlined in (b), does not turn it into a contribution.

Chairman Getman stated that one draft of the regulation provided that, but the Commission was concerned that it might complicate the regulation. She did not believe that the proposed regulation would change the current definition of "contribution."

Mr. Woodlock stated that the purpose of the regulation was to define "made at the behest of" only.

In response to a question, Mr. Woodlock agreed that this also included § 82031, which defines "independent expenditure." He did not believe that "made at the behest of" was in the expenditure section.

Chairman Getman noted that there was a note referring to §§ 82015, 82025 and 82031 at the end of the regulation.

Ms. Menchaca agreed, noting that the primary question addressed was when something actually triggers a reporting obligation of an expenditure.

Mr. Woodlock stated that it affects the statute but the statute itself does not have the words, "made at the behest of." It was important to remember that "made at the behest of" occurs in § 82031, defining “independent expenditure.”

Jim Sutton, with the law firm of Nielsen Merksamer, stated that he agreed with Mr. Olson and the notion that express advocacy is integral to this regulation. He agreed that, without express advocacy, the communication will not be regulated, but believed it contradicted with Mr. Woodlock’s memorandum.

Chairman Getman discussed reporting of payments for communications that clearly identify a candidate but do not contain express advocacy.

Mr. Sutton noted that it is only for purposes of reporting under the issue advocacy statute, and is not intended to make something a contribution subject to limits.

Mr. Woodlock explained that if an expenditure is made at the behest of a candidate or a committee, it is considered a contribution, which is a sub-class of expenditure. Therefore, what started as an expenditure became a contribution because it was made at the behest of a candidate or committee. This became part of the law after *Buckley*. Express advocacy is not relevant to that inquiry. The contribution statute and regulations contain exceptions, and § 82015 and regulation 18215 should be considered to determine whether it is a contribution. In general, however, an expenditure made at the behest of a candidate is a contribution.

Chairman Getman noted that the exceptions to "contribution" in § 82015 have not been changed.

Ms. Menchaca pointed out that the proposed regulation does not attempt to define or redefine "express advocacy."

In response to a question, Mr. Woodlock stated that the regulation only defines, "made at the behest of."

Mr. Olson stated that he did not disagree, but noted that (b) focused only on communications and regulation 18215(c)(4) provides that those communications are not contributions unless they contain express advocacy. He did not think that the proposed regulation did any harm, but did not believe it was necessary.

Mr. Woodlock explained that subdivisions (c)(1) and (c)(2) are presumptions that are already in the existing regulation, but that staff proposed adding the "joint employment" and "republication of campaign materials" presumptions. He noted that the "joint employment" presumption caused some controversy at the September 2002 Commission meeting.

Mr. Woodlock explained that the 1990 *Davis* letter found a strong inference of coordination whenever there were joint employment issues. The presumption follows up the *Davis* suspicion

and puts it into the regulation. He noted that the Commission was more concerned about serial employment, when a person leaves employment in a campaign to take a job with a media house.

Chairman Getman requested that the discussion clarify who the Commission should be concerned about with joint employment. She asked whether adding the language, "professional services related to election strategy or advocacy," makes clear that joint employment of treasurers have been eliminated.

Mr. Woodlock did not think so, noting that job descriptions cannot be relied on because treasurers in some campaigns also serve as political consultants/strategy advisor/media gurus, etc.

Chairman Getman stated that the regulation should not include professional treasurers who work for many campaigns in a season.

Mr. Olson stated that professional treasurers do not customarily provide strategy, planning or advocacy, although he agreed that it may be true when a best friend agrees to be treasurer. He commented that the language is repeated in the next regulation, and that it does not belong in this regulation. It is important to make sure that people cannot avoid contribution limits through independent expenditures, and it would be more appropriate to have the language in regulation 18550.1. He was concerned with the duration period in the language of that regulation, noting that a consultant who worked in a primary and left the primary at the end of the campaign would be precluded from working for another candidate in the same campaign until just before the general election.

Commissioner Downey stated that the consultant would not necessarily be precluded because the language involved a presumption.

In response to a question, Mr. Woodlock stated that Evidence Code § 604 provides that the respondent would be required to produce some evidence in order to rebut the presumption. If the respondent writes a declaration under penalty of perjury denying any cooperation or collusion, Mr. Woodlock believed that the trier of fact would decide that the presumption had been rebutted.

Commissioner Knox questioned whether the presumption is of any assistance to enforcement if the presumption can be rebutted simply by denying guilt.

Mr. Woodlock stated that the law affords great weight to sworn statements. He believe the regulation would still be of assistance because, if a treasurer makes a sworn statement and divulges other information in the process, it would result in getting evidence early without having to go through discovery. If it is learned that the respondent can rebut the presumption, it would end the litigation at an early stage, saving enforcement staff unnecessary work.

Enforcement Chief Steve Russo explained that the presumption shifts the burden of proof to the respondent. The fact that they have to make the statement gives enforcement staff a starting point for their investigation.

Commissioner Knox stated that a law enforcement agency should have the burden of proof and that the presumption should not be taken lightly, particularly when the reversal of a presumption is based on the employment status of the individual.

Mr. Woodlock reiterated that the presumption does not shift the burden of proof, but shifts the burden of production.

Commissioner Knox responded that he was uncomfortable even with shifting the burden of production because the burden is so lightly carried off by a potential respondent.

Mr. Woodlock stated that presumptions already exist in the regulation, and that staff was recommending the addition of two more. He noted that the presumptions serve an educational purpose as well as having an enforcement value, noting that Technical Assistance Division favors the additional presumptions because they provide advice to the public.

Mr. Olson pointed out that a rebuttable presumption becomes a conclusive presumption because the consultant would not work in another campaign until the period of time had elapsed in order to avoid possible prosecution by the FPPC.

Chairman Getman agreed that it would be inappropriate for a candidate's consultant to move over to an independent expenditure committee 90 days before an election, unless they prove that the move did not affect the independence of the committee. She noted that this would involve a narrow subset of people who make decisions related to election strategy or advocacy, and may be a proper thing to do.

Chairman Getman did not know if the regulation had narrowed the presumption correctly, noting that fundraisers are often shared between a candidate and a series of independent expenditure committees. She asked whether there should be a presumption in that circumstance that the two groups are not independent from each other.

Commissioner Knox responded that there should not be a presumption if they are in fact coordinating with each other.

Commissioner Gordana Swanson joined the meeting at 11:55 a.m.

Chairman Getman stated that the proposal was primarily directed at independent expenditures, but noted that the language of § 82015 was applicable to behested payments. She questioned whether the language in the regulation pertaining to § 82015 was harmful in any way, noting that the bulk of its effect would be in other statutes.

Mr. Olson responded that he needed more information regarding other issues before he could agree with the Chairman. He continued to believe that it was probably not necessary to have the language in this regulation since the same exact presumptions were included in regulation 18550.1.

Chairman Getman asked whether regulation 18550.1 should be made expressly applicable to § 82031, in addition to § 85500.

Mr. Woodlock stated that it could be.

The Commission adjourned for a lunch break at 12:00 p.m.

The Commission reconvened at 1:23 p.m.

Chairman Getman asked why it would be wrong to adopt proposed regulation 18550.1 unless regulation 18225.7 is adopted.

Mr. Woodlock responded that independent expenditures are neither the only nor the most important kind of expenditure that is subject to regulation under the Act. Regulation 18225.7 is important because it governs far more of the actual campaign spending. Additionally, if the Commission considered the kind of language in regulation 18550.1, and expressly rejected the inclusion of that language in 18225.7, people might think that the conduct cited in 18550.1 would presumably be legitimate under 18225.7.

Ms. Menchaca agreed, noting that the scope of § 85500 is limited to candidates, it would leave less guidance with regard to ballot measure expenditures.

Mr. Olson did not agree that more campaign money is spent on issue advertisements than express advocacy, noting that last year's expenditures did not indicate that issue advocacy was occurring. He believed that, since unions and corporations were not prohibited under California law from making direct expenditures for express advocacy as they are under federal law, they do not try to get around source prohibitions by engaging in issue advocacy. He recommended that the Commission adopt 18550.1 but not adopt 18225.7, noting that much of the language under debate is in the independent expenditure regulation.

Chairman Getman questioned how a communication that was not express advocacy would be handled, how often that situation would occur, and how to determine whether the communication was made at the behest of a candidate.

Mr. Olson agreed that guidance was necessary, but noted that advice letters currently provide that guidance.

Chairman Getman noted that it might make more sense to have the same rules in terms of whether the contribution is "behested."

Mr. Olson responded that "at the behest" has been a problem in the past when dealing with independent expenditures and continued to be an issue. He agreed that additional guidance was needed, but noted that future FPPC Commissions and staff could interpret the regulation differently that the current Commission intended.

Mr. Woodlock stated that concerns about how subsequent Commissions or staff might misconstrue the regulation was an argument against having regulations altogether. He agreed that it was a possibility, but did not believe it should be a deterrent to improving the regulations we already have. He noted that both of the proposed regulations clarify what "made at the behest of" means, and nothing else. Both use the same language to describe the same conduct, and he believed that language that is acceptable in one regulation ought to be acceptable in the other. He urged the Commission to question why Mr. Olson opposed having the language in both regulations, noting that there are campaign expenditures that are subject to 18225.7 that are not subject to 18550.1. Staff believes that, in defining "coordination," what is good for an independent expenditure is also good for the same conduct in other kinds of expenditures.

Chairman Getman asked whether the Commission should have removed the sentence stating that the Commission did not intend to change the exceptions to contributions in regulation 18215.

Mr. Woodlock responded that staff did not see how the language could be misconstrued, as suggested by Mr. Olson. He noted that there are three memos on the subject, and the memoranda and minutes make pretty clear what the Commission is trying to do.

Chairman Getman noted that she thought the Commission was clear on the Phase 2 regulations regarding significant segment and small jurisdictions, but apparently they were not.

Mr. Woodlock said he would be happy to include a sentence in the regulation to clarify the issue, noting that it would be preferable to not passing the regulation because of hypothetical concerns for the future.

Mr. Sutton suggested that it be included as a regulation defining issue advocacy reporting under that provision of Proposition 34.

Chairman Getman noted that there are also voter registration activities made at the behest of a candidate and the behested payments made by the Legislature.

Mr. Sutton suggested referencing those sections in the regulation, ie. "For purposes of deciding whether something is a contribution because it is voter registration made at the behest of a candidate."

Mr. Woodlock responded that the regulation applies to every statute or every other regulation that uses the expression, "made at the behest of."

Chairman Getman suggested that a sentence be added at the end reading, "A determination that something is made at the behest of a candidate does not answer whether it is a contribution. For that you need to look at regulation 18215."

Mr. Woodlock agreed, and encouraged the review of all of the statutes and regulations using, "made at the behest of."

In response to a question, Mr. Olson stated that the Chairman's proposed sentence would provide some comfort, but explained that he had two other concerns in subsection (e) of the regulation.

Chairman Getman suggested that a sentence be included in regulation 18225.7 clarifying that the Commission does not intend to address whether something is a contribution by addressing whether something was made at the behest of a candidate.

Ms. Menchaca noted that staff tried cross-references and specific language in prior revisions of the regulation, explaining that they were removed in an effort to eliminate objections to the regulation.

Chairman Getman recapped the earlier discussion involving rebuttable presumptions, noting that questions had not yet been answered regarding retaining the services of someone who previously worked on a campaign and the time limit for that change. There were also questions about whether, "professional services related to election strategy or advocacy," was both comprehensive enough and tailored enough to encompass who should be included. She asked whether there should be a presumption when someone worked as a professional fundraiser for a campaign while working as a professional fundraiser for a number of independent expenditure committees.

Mr. Woodlock suggested that it could be inserted in subdivision (c), so that the first line on page 2 of the proposed regulation would read, "professional services related to fundraising, election strategy or advocacy,…"

Chairman Getman asked if that would be over-inclusive.

Mr. Sutton responded that the idea of a rebuttable presumption is helpful. He agreed that, typically, attorneys will tell clients not to do the conduct in order to avoid the rebuttable presumption issue. He was concerned that the words, "strategy," or "advocacy" were not focused on in the memo. He noted inconsistencies in subsections (e)(4) and (5), discussing "needs" or "strategy" and subsection (c)(1), discussing "needs" or "plans." He suggested that strategic advice is what taints an expenditure, but "needs" or "plans" could be interpreted very broadly by enforcement staff. He suggested that the word "strategic" may be all that is needed.

Mr. Sutton stated that, "polling, research, media consulting and advertising planning," was a list of concern. He asked whether "research" included asking a treasurer to research where the candidate's opponents get their campaign money. He did not believe it would be a problem with vendors. It could be a problem for printers and mail houses in small jurisdictions where there are limited numbers of mail houses and printers.

Mr. Sutton disagreed that fundraising is a problem that should lead to a rebuttable presumption because most fundraisers are not involved in strategy. The independent expenditure rules address whether the candidate is involved in (for instance) a billboard financed by a PAC. Just because a person raised money to help pay for the billboard it is not necessarily relevant to the question of whether the development and payment of the billboard was done in coordination with the candidate. The fundraiser most likely will not know how the money raised will be spent.

Mr. Sutton stated that it would be appropriate to work for an independent expenditure PAC and then work for a candidate. He noted that the phases of a campaign would affect the duties of a consultant. Their duties at the beginning of a campaign should not prevent the consultant from working for an independent expenditure PAC later on. The *Davis* letter has satisfactorily provided guidance for years on this issue.

Mr. Woodlock commented that the Commission would need to decide whether to be more specific in the regulation so that the guidelines are more clear, or whether to retreat into generalities. If the Commission used the word "consultant" only, questions would arise regarding what a consultant is, and additional concerns would arise regarding people with strategic knowledge other than consultants. Staff needed time to explore Mr. Sutton's concerns. Mr. Woodlock pointed out that there could be a problem with a person moving from an independent expenditure PAC to a candidate's committee because that person can tell the candidate about any plans the PAC may have to assist the candidate.

Chairman Getman noted that the independent expenditure committee was acting independently when it made those decisions, and questioned what difference it made if the person went to the candidate's committee.

Mr. Woodlock responded that knowing the plans of the PAC might affect the candidate's campaign decisions. He noted that the PAC would be telling the candidate where to spend money and could be considered coordination. He believed it should be further explored.

Commissioner Knox stated that he has always considered "at the behest of" to be a one-way street, and the proposed regulation used language that seemed to refer to the candidate directing the independent expenditure committee. He was not comfortable expanding that interpretation.

Mr. Woodlock stated that the California campaign statutes were unique in defining "coordination" with the term "made at the behest of." When a candidate committee is told the intent of a PAC in other jurisdictions it may be counted as cooperation or consultation. He agreed that "made at the behest of" raises questions as to whether coordination in California means the same thing as it does everywhere else.

Commissioner Knox stated that "behest" was almost the same as "request" in the PRA. That being the case, he believed that the request would always be coming from the candidate to the independent expenditure committee.

Mr. Woodlock responded that when the Commission adopted the regulation in 1995, it tried to define "made at the behest of" as a term for coordination that is more consistent with coordination as it is understood in the literature generally.

Ms. Menchaca noted that staff was not trying to cover every situation that might occur. Staff understood that other situations will arise that should be covered in the regulation, but that the proposal reflects those situations that frequently arise, and serve to guide the public. She noted

that staff needed to address the concept of when the same person can be used for certain types of activity, and work it into the language of subdivision (c)(3)(A).

Ms. Menchaca agreed that the concept of the independent expenditure committee employee going to the candidate committee should have further study. When the project was first begun, staff was concerned that the only guidance the public had was a 1990 *Davis* advice letter, and more was needed in a regulation. She believed that the proposed regulation was an improvement and would be helpful to the public.

Commissioner Knox stated that he was not ready to vote on the issue, noting that he did not yet understand the reach of the regulation.

Chairman Getman agreed, but noted that the discussion was helpful. She agreed that the regulation cannot cover everything, and was concerned that the proposed regulation might be too inclusive. She stated that the regulation should cover conduct that should clearly have a presumption. She suggested that subdivision (c)(3)(A) might read, "The person making the expenditure retains the services of a person who provided the candidate or committee with professional services related to election strategy or fundraising for that same campaign." She did not necessarily agree that it should matter if the person did it for a different campaign. Fundraisers often work for several committees and candidates, however, and she was not comfortable with the language, "polling, research, media consulting and advertising planning." Many campaigns use other vendors that do not get involved in campaign strategy. She did not understand what "election advocacy" referred to.

Commissioner Downey stated that the Commission should decide whether regulation 18225.7 needed amending. He believed it should be amended because it added something useful.

In response to a question, Mr. Woodlock stated that subsection (d) could be eliminated because it will be dealt with earlier and more cleanly.

Mr. Olson stated that his office deals with fundraisers who work for independent expenditure committees by including in their contract a provision that they may not work for a candidate that may be the beneficiary of an expenditure by the independent expenditure committee. It is a cautionary measure.

Mr. Olson stated that subsection (e)(1) language reading, "discusses matters unrelated to the candidate's or committee's campaign," amended an existing provision that he understood to permit an organization to meet with and interview a candidate to decide whether to endorse that candidate's election. He was concerned that the unrelated language may change something. He understood it in the past to mean that they should not discuss campaign strategy but that the issues of the campaign could be discussed.

Chairman Getman stated that the Commission did not intend to change that.

Mr. Olson stated that the language, "discusses matters unrelated to the candidate's or committee's campaign," might preclude an organization from interviewing the candidate, because the issues under discussion would be related to the candidate's campaign.

Mr. Woodlock agreed, and suggested that adding "strategy" to the language would fix the problem.

Commissioner Swanson noted that committees who plan to endorse a candidate will discuss strategy with the candidate in order to ascertain that they would be backing a viable candidate.

Mr. Olson agreed, noting that it would not be wise to support someone who did not have a chance of winning because of an ineffective campaign strategy. He suggested that the committees could ascertain the campaign strategy by looking at the candidate's campaign reports (as an example) instead of asking the candidate. He believed that the organization should be allowed to talk to the candidate about issues that are important to the organization.

Mr. Woodlock asked whether the language of the regulation should not be amended.

Mr. Olson responded that he was comfortable with the old language, but noted that it did not deal with discussions about campaign strategy during an interview of the candidate.

Mr. Olson stated that he was also concerned about the use of the word, "public" in Decision 4, subparagraphs 3 and 4. He did not understand the meaning of the word as it was used in the proposed regulations, but noted that many business meetings would not be open to the public, and he saw no reason why the request had to be a public request. Mr. Olson explained that it was not uncommon for a candidate to call or write an organization to ask for support, and that would not be characterized as a public request. The fact that the candidate asks should not translate into a coordinated expenditure and should enjoy the same presumption that is being created with the public request.

Mr. Woodlock responded that Mr. Olson was correct with regard to subparagraph 4, and that the word "public" could be eliminated from the regulation to resolve the issue. Some meetings, he agreed, are not public meetings and should not be a concern as long as the presentation is to a body of people. However, if "public" is removed from the language of subparagraph 3, any request for support would not be considered as “behested,” but could be the kind of coordination that is of concern. He reminded the Commission that subdivision (e) includes "safe-harbor" provisions, but that a person who cannot get the benefit of subparagraph 3 is not presumed to have coordinated.

Chairman Getman asked whether a person who receives a call from a candidate asking for support from the person's organization would have a problem under the proposal.

Mr. Woodlock responded that, "at the behest of" means, literally, "at the request of." Staff was trying to craft exceptions for scenarios where it is clear that no coordination existed. He explained that no possibility of coordination exists when an organization responds to a television advertisement, but a telephone conversation could involve coordination.

Ms. Menchaca stated that this proposed subdivision was aimed at requests of a general nature.

Mr. Woodlock stated that there would not be a problem with the Chairman's telephone discussion as long as there was no further discussion. If a candidate simply asks for money, there should be no problem.

Chairman Getman noted that it would be a contribution under Mr. Woodlock's scenario.

Commissioner Swanson questioned whether a candidate could call an organization and tell them that a commercial cannot be produced without a donation.

Mr. Woodlock responded that the benefit of a presumption that there was no coordination would be denied in that case. However, he noted that it would not mean that there was, necessarily, coordination.

Chairman Getman read the language, "a person makes an expenditure in response to a request for support by a candidate, provided there is no discussion with the candidate prior to the expenditure relating to the candidate's campaign needs or strategy or the details of the expenditure," noting that everyone agreed that it was not a behested payment.

Mr. Woodlock questioned whether deletion of the word, "public," would alleviate the Commission's concerns.

Mr. Olson supported that change. He noted that staff concerns would be covered in the proviso. Telephone calls and letters are not unusual in campaigns, and may be specific. Organizations cannot stop the telephone calls or letters and the fact that they receive them should not be enough to preclude them from getting the protection of the presumption. If the strategy of the campaign is discussed, then the presumption should be lost.

Mr. Olson expressed support of subparagraph (6) in Decision 4. He asked whether two independent expenditure committees that coordinate their activities with each other but do not coordinate those activities with the candidate would be making "in-kind" contributions to each other as a result of the coordination. This would make a big difference in those jurisdictions that have contribution limits. He explained that the *Borden* letter, written under Proposition 208 when there were contribution limits, stated that, "Coordinating activities between independent expenditure committees is not making the contribution back and forth to each other." He asked whether that rule was still in place. Mr. Olson also noted that it was not uncommon for two or more primarily-formed committees in support of or in opposition to the same ballot measure to coordinate their activities. Written staff advice has provided that the activity does not constitute an in-kind contribution from one ballot measure committee to another. It would constitute expenditures in support of or opposition to the ballot measure, but the mere fact of coordination would not create an "in kind" contribution. He asked whether that changed.

Chairman Getman noted that the issue came up before, and there was some question as to whether that was truly the staff advice.

Ms. Menchaca stated that the *Borden* advice letter dealt with an interpretation of a totally different statute and did not think that its principle would be changed, but that staff would have to study it to see if it applied.

Mr. Woodlock stated that it was not his intent to change the advice, but he knew that it would not be possible to deal with every possible scenario. He believed that was acceptable since there needed to be some room for advice letters.

Chairman Getman responded that it was impossible to argue that the rule was not changed with respect to committees in the regulation.

Mr. Woodlock stated that, if that was the case, it should be fixed.

Chairman Getman read from subdivision (b)(2)(A), explaining that it described the scenario posed by Mr. Olson, making it a behested payment.

Mr. Woodlock stated that the scenario posed no harm when dealing with candidates because there was a special exception under the definition of "contribution" for candidates. However, committees do not have a corresponding exception. He did not know whether it could be addressed in this regulation.

In response to a question, Mr. Woodlock stated that it was not necessary to have a regulation for everything and that there should be regulations for those issues that generate questions. "Coordination" questions, he noted, occur frequently, and he worked with Technical Assistance Division to address those issues that received the most questions.

Mr. Sutton reiterated his request that the word "need" be deleted from the proposed regulation 18225.7(e)(3), (4) and (5) because the term is too broad. He also recommended a presumption be added providing that a behested expenditure is not made when a contribution is made to the candidate. He suggested that hosting a fundraiser for a candidate should not disqualify someone from later doing an independent expenditure. If a person is asked to sit on a steering committee for a fundraising event, and requests that friends and neighbors buy tickets to attend the event, that person should be presumed to be okay.

Chairman Getman noted that the regulation addressed professional services related to fundraising.

Mr. Sutton clarified that he was suggesting additional rebuttable presumptions.

Mr. Sutton stated that when an organization's members (who are not involved in making decisions related to the organization's independent expenditure) volunteer for a candidate's campaign, the organization should not be prevented from making an independent expenditure.

Commissioner Swanson objected to the language, "no discussion with the candidate or committee prior to the expenditure relating to the candidate's or committee's campaign needs or strategy," because it was too broad.

Mr. Woodlock responded that the word "needs" will be deleted, and noted that the language did not presume coordination. Rather, they were safe-harbor rules. Failure to meet the critera would not mean that the FPPC would necessarily pursue an enforcement action.

Chairman Getman summarized that there would be significant changes in regulation 18225.7(c)(3)(A), narrowing the provision. Subdivision (d) would be eliminated. There would be significant changes in most of the provisions of subdivision (e). There was a suggestion that additional language clarify that the regulation only answers whether something is made at the behest of a candidate, and does not address whether it is a contribution. Further study would need to be done regarding the use of the word "committee," to determine whether it would undo previous advice that coordination between independent expenditure or ballot measure committees does not result in an in-kind contribution. Language would be added to provide that merely making a contribution does not amount to coordination. Regulation 18550.1 (which would have to have the same changes) would have to be clarified to also apply to § 82031.

Ms. Menchaca questioned whether the scope of regulation 18225.7 would still be independent expenditures.

Chairman Getman responded that staff should look at the interplay between 18225.7 and 18550 with respect to independent expenditures.

Mr. Woodlock stated that if the Commission adopts both regulations, language should be added to both regulations specifying what the interplay is.

Ms. Menchaca questioned whether the Commission would support expansion of regulation 18550.1 to cover both candidates and committees, noting one concern that the regulation should be narrowly tailored to apply only to § 85550.

Chairman Getman responded that the Commission was concerned about coordinated expenditures and "at the behest" for candidates for purposes of reporting contributions and because of contribution limits.

In response to a question, Technical Assistance Division Chief Carla Wardlow stated that there was concern about coordinated activities between committees because ballot measure committees need to determine whether something is a contribution or an independent expenditure when a ballot measure committee receives support from some other type of committee.

Mr. Woodlock asked whether serial employment of the campaign consultant was an additional concern.

Commissioner Downey stated that he would like to see a 6-month time period.

Chairman Getman suggested that the serial employment provision be eliminated unless it involved the same campaign. In that case it should be coordination.

Commissioner Downey stated that the presumption sounded appropriate.

In response to a question, Chairman Getman stated that she was not as concerned about someone who works for the primary then works for someone else during the general election. She asked staff to address the question.

Commissioner Knox stated that the focus should be on campaign strategy, and the trading of insider information. He presumed that strategy would change between the primary and the general elections, and should be less of a concern than someone who changes employment in the middle of a primary or general campaign.

Commissioner Downey agreed that it would be true in some elections, but not in others.

Commissioner Knox questioned what information the Commission was trying to prevent from being exchanged. He presented examples of types of information that may be exchanged, ranging from a candidate simply saying that votes were needed, to a candidate saying that flyers needed to be distributed in a certain area.

Mr. Woodlock responded that the more difficult questions would ultimately have to be heard by a judge.

Chairman Getman stated that a person who works on a campaign for both an independent expenditure committee and for the candidate, should be presumed to be coordinating. However, if a person worked for an independent expenditure committee during the primary, then went to work for the candidate during the general election, the independent expenditure committee should not be precluded from making independent expenditures during the general election. She noted that the farther afield the Commission gets from something that is clearly improper coordination, the more concern there is that the rule goes too far.

Mr. Woodlock agreed, noting that the Commission appeared to favor a joint employment presumption for simultaneous employment, and would consider serial employment within the same election campaign.

Item #3. Emergency Adoption of Regulation 18530.2, Section 853-6, Transfer of Pre-Proposition 34 funds.

Staff Counsel Scott Tocher distributed two new drafts of version A and version C of the proposed regulation, noting that he would be working with those during the meeting. He explained that § 85306 states the general rule that transfers among a candidate's own committees are to be attributed to specific contributors. He noted that subdivisions (b) and (c) provide an exception to the attribution rule for funds possessed by a candidate prior to the effective date of the attribution requirement (pre-34 funds).

Mr. Tocher explained that questions arose regarding the status of pre-34 funds when they are mixed with contributions received after the effective date of the attribution requirement (Prop-34 funds), and how future transfers among a candidate's committees should be dealt with. The Commission could interpret the exceptions narrowly, minimizing the number of times the funds may be transferred (version A of the draft regulation), or interpret the exceptions broadly, providing few or no limits to the number of transfers of pre-34 funds without attribution (version C).

Mr. Tocher stated that the Commission must first determine whether the statute contained ambiguities. If it can be interpreted in different ways, then the Commission must decide how to interpret it based on rules of construction, Commission policy and the Constitution. Mr. Tocher noted that comments received from elected officials and others indicate that the statute can only be interpreted to allow unlimited transfers of pre-34 funds. Staff disagreed with that opinion, and Mr. Tocher pointed to the differing interpretations of this statute offered at the Commission's December 2002 meeting, as evidence of the itsambiguity.

Mr. Tocher recalled that the Commission expressed concern about the effects of allowing an unlimited number of transfers, noting that it would give candidates the ability to move large amounts of money without attribution from one campaign to the next. He noted that an interpretation that would limit transfers without attribution would help to move elections more quickly and completely into the Proposition 34 contribution limited environment.

Mr. Tocher stated that versions A and C presented options for the Commission's consideration, noting that each entailed constitutional questions. Version A allowed for a simple system of one transfer without attribution. Version C allowed essentially unlimited transfers of the pre-34 funds without attribution. There were two different "Version C" proposals for accounting for pre-34 funds once expenditures are made.

Mr. Tocher discussed the *SEIU v. FPPC* litigation, and its three different court opinions dealing with two different proceedings in the case (involving Proposition 73). He explained that one District Court opinion addressed a carryover provision, and a second District Court opinion by the same court addressed the contribution limits and the transfer ban. An appellate decision affirmed the court's opinion on the latter issues. He explained that the transfer issues were different because the case involved a ban on transfers among committees, and that the court invalidated that provision. The court also invalidated the carryover provision, because the court considered it an expenditure limitation and therefore unconstitutional. The cases did not address a transfer limitation. The proposed Proposition 34 regulation was not a ban, although it was a burden. The court did not consider the interplay of an attribution statute in a scheme without contribution limits. He did not believe that *SEIU* provided clear guidance on the issue.

Chairman Getman stated that *SEIU* made her very uncomfortable with version A because it suggested that it was unconstitutional to consider the issues that concerned her last month. She suggested that the Commission consider only the two version C's.

Commissioner Downey agreed.

Commissioner Knox did not share the Chairman's constitutional concerns because the regulation did not deal with a ban on transfers. He supported version C, however, because he believed that the statute did not leave room to limit the transfers.

Chairman Getman stated that, under version A, the funds might not be able to be used, which would create, in reality, a ban.

Commissioners Downey, Swanson, Knox and Chairman Getman agreed to focus on versions C.

In response to a question, Chairman Getman explained that the regulation was presented as an emergency regulation because committees needed to make immediate decisions about how to move funds.

Commissioner Swanson noted that there were no upcoming elections.

Chairman Getman agreed, but noted that the funds might become surplus before candidates decide what election to run for. Committees had to be closed, and the funds had to be moved before the committees could be closed.

Commissioner Downey noted that it would not be fair to wait until it is closer to the next election to give them answers to the issue. He agreed that there was a sense of urgency for the regulated community.

Chairman Getman added that it is important to know whether money currently being spent must be subtracted from the amount being transferred, because it will affect whether and how money is spent by the committee. She noted that it is an emergency because the problem was just identified in December 2002, and candidates were already making decisions based on assumptions that the regulation would be interpreted in certain ways, which may or may not have been true.

Mr. Tocher explained the difference between the two version C's. Both versions provided that there would be no limit on the number of times a committee may transfer pre-34 funds, but Version C-option 1 provided that the amount that may be transferred without attribution is reduced by any expenditures made by the committee, even if the committee has received additional Prop-34 contributions. Version C-option 2 would make the same limitation, except that the limitation would apply to the committee that received the pre-34 funds from the committee that originally had them.

Commissioner Knox read from the statute, and explained that both versions C were trying to identify "those funds," that may be transferred without attribution after January 1, 2001. Version C-Knox differed from the other version C because it would provide that the funds subject to transfer without attribution would be the lesser of the balance on January 1, 2001 less any amounts transferred without attribution after January 1, 2001, or simply the lowest balance in the transferring committee's account on or after January 1, 2001. He noted that a transferring committee will have combined both pre-34 and Prop 34 funds. He believed that Version C-Knox

more precisely pinpoints the transfer, but noted that the advantage may be offset by the complexity in bookkeeping it might create.

Chuck Bell, from Bell, McAndrews, Hiltachk and Davidian, stated that he saw no legal basis for the reduction in the transfer amount, as he outlined in his comment letter. He believed that Version C-Knox seemed better, and did not think it would be harder to apply than the other Version C. Version C-Knox also seemed less punitive. He did not know that an incumbent versus challenger issue was involved, because incumbents carry over the funds, but challengers most likely do not.

Commissioner Downey stated that Version C was a "FIFO" approach, providing that when unattributed funds are transferred, and the recipient committee later makes a second transfer, the question to consider will be how much unattributed money came in to the committee and how much was spent since that money arrived. Version C-Knox would be a "LIFO" approach, providing that as long as the amount of money in the account remained as high as it was when the pre-34 money was put in the account, those monies could be transferred without attribution. He suggested that the voters passed Proposition 34 in order to have contribution limits and reporting of contributions and expenditures. Anything that hastened the complete transition to the Proposition 34 scheme should be encouraged, and the FIFO approach would best accomplish that because it would eliminate the pre-34 funds more quickly.

Mr. Bell explained that the LIFO approach seemed more consistent with the underlying principle of § 85306.

Chairman Getman stated that the statute says that those funds may be used to seek elective office, but does not say that they may be held and carried over forever. Case law says that the use of those funds cannot be restricted. However, there is no law that says that they must be protected from ever being used. Under the Version C-Knox version, they could be protected and held as a "war chest".

Mr. Bell responded that the distinction was not in the carryover situation, but was in the transfer situation. People carry over money to run for re-election to the same office. People who transfer money are running for another office. While some candidates may like to carry money over, most candidates he deals with are trying to spend the money to seek election to an office.

Commissioner Downey stated that it would be fairly simple to make the calculation.

Mr. Bell agreed that it would not be hard to calculate, but questioned whether the funds had to be attributed back to the first people who donated them.

Commissioner Downey stated that the Commission was trying to avoid that problem. The funds would be subject to unattributed transfer, but the question was how much could be transferred.

Mr. Bell presented a scenario whereby a person who had pre-34 funds in the amount of $100,000 and then ran for Assembly in 2002. The candidate raised an additional $300,000 and spent $200,000 leaving a balance of $200,000 as of 12-31-02. Under Version C, there would be no

unattributable money left to transfer. Under Version C-Knox, $100,000 could be transferred without attribution because that was the lowest bank balance. He agreed that the result of Version C would be consistent with the objective of getting old money out of the system.

Chairman Getman noted that if the money was used in the 2002 election, there would be no practical problem like the one presented in Version A. The question was whether the money could be moved forward a second time without attribution.

Mr. Bell stated that the other scenarios would have different results. He did not believe that leveling the playing field was a constitutional consideration.

Chairman Getman stated that, if pre-34 money was not used in 2002, the full amount would be available under either version C for the 2004 election. The difference would show up in subsequent elections beyond the first one. Under Version C, there would probably be no unattributable money available for the second subsequent election, while Version C-Knox would probably result in having unattributable money available for subsequent elections.

Russell Miller, from the law office of Russell Miller, stated that it was too late for this regulation. His client, Assemblyman Simitian, had a separate account set up on January 1, 2001, based on what they thought the law was. He explained how Assemblyman Simitian handled his committee accounts, noting that if he had known about this regulation on January 1, 2001, he would have handled it differently. Mr. Miller noted that Assemblyman Simitian phoned the FPPC for advice and was never told about having to deduct expenditures from the money he transferred from the pre-34 committee.

Chairman Getman noted that the money he had on January 1, 2001 was segregated and never transferred to the 2002 election.

Mr. Miller agreed, noting that they did deposit more money into the 2000 committee.

Chairman Getman stated that, under version C option 2 and under Version C-Knox, Assemblyman Simitian would still have unattributable funds.

Mr. Miller supported option 2, and stated that the Commission should not adopt a regulation that would apply to decisions already made that could not now be changed.

Chairman Getman stated that the statute provides that the funds may be used to seek elective office. If the funds were not used to seek elective office, she did not believe that the candidate should be penalized.

Commissioner Downey stated that under option 1, Assemblyman Simitian may have spent money from his pre-34 fund after January 1, 2001.

Chairman Getman agreed, noting again that the funds were not spent to seek elective office.

Commissioner Downey and Chairman Getman agreed that the Commission should consider Version C option 2 or Version C-Knox.

Scott Hallabrin, from the Assembly Ethics Committee, stated that current Assemblymembers who held funds on January 1, 2001 are required to close those accounts by August 31, 2003. If they move that money to an account for their next election to the Assembly, then officeholder expenses come out of that account, and he questioned how the rule would work in those cases.

Chairman Getman noted that they would want the money to be spent on a future election committee instead of on officeholder expenses.

Mr. Hallabrin agreed.

Chairman Getman asked why they would not just open a committee for the 2004 election.

Mr. Hallabrin responded that it would force them to decide what office to run for, when they may not be ready to make that decision.

Chairman Getman noted that there would be no penalty for transferring the money again if they changed their mind. She suggested that they could request an extension to the termination because they still have January 1, 2001 funds and had not yet decided what to run for. However, she was not sure if that would be allowed under the regulation.

Commissioner Knox questioned whether debiting otherwise unattributable funds in an account for officeholder expenses, as would be done under option 2, would be consistent with using the funds, "to seek elective office without attributing the funds."

Chairman Getman did not think that they could.

Commissioner Knox stated that, in order to accommodate Mr. Hallabrin's concern (which is allowed under the statute), the candidate would have to do separate bookkeeping delineating election-related expenses that would be debited against otherwise unattributable funds. Officeholder-type expenses would have to be paid out of the account but would not be debited to the otherwise unattributable funds. He asked whether it collapses due to the complexity.

Chairman Getman noted that it would only happen when a new election account was not opened, if they are moved into a 2002 committee.

Commissioner Knox noted that § 85306 allows that.

Mr. Hallabrin questioned whether funds transferred into a 2004 election account and then spent on officeholder expenses, would have to be counted as election expenses under the FIFO method.

Chairman Getman asked whether the monies in the 2004 account would be spent on 2002 office-holder expenses.

Mr. Hallabrin responded that the office-holder would have to because money cannot be raised into the 2002 account for anything other than debt.

Chairman Getman agreed that it was a practical problem, noting that the Commission has often encouraged the Legislature to set up office-holder accounts.

In response to a question, Chairman Getman agreed that officeholders should make sure that they have justification when spending for officeholder expenses from their 2004 election account.

Mr. Hallabrin responded that he believed that the rules would allow it.

Chairman Getman agreed that the regulations make it more difficult to spend the money in many different ways, but also observed that it indicates that the officeholders will have to spend the money. She was concerned about money that was held over a long period of time.

Commissioner Knox agreed, noting that he did not like the idea of money floating from one election cycle to another, and another. However, he was persuaded that the statute contemplates that scenario.

Chairman Getman stated that the statute provides that the funds can be used to seek elective office.

Commissoner Knox responded that the funds should be used at a time that the candidate chooses.

Mr. Tocher stated that Mr. Hallabrin appeared to pose a carryover question, in which this regulation would not come into play.

Commissioner Downey noted that it still presents a problem.

Mr. Hallabrin noted that the officeholder would still be forced to do something with the funds because the accounts must be closed.

Commissioner Downey stated that, because of the carryover provisions, the regulation really addressed scenarios whereby an officeholder is planning to change offices. He noted that having the pre-34 funds around for a long time may not be a major problem because, once the candidate runs for the new office, it is likely that no money will be left over.

Diane Fishburn, with Olson, Hagel and Fishburn, and on behalf of Senator Don Perata, stated that she believed Senator Perata would prefer Version C-Knox because if follows the intent of the statute. She presented a scenario under which a Senator elected to the Senate in 1998 redesignated the committee for the reelection effort. On January 1, 2001, the Senator had 2002 election committees, but most of them had been in effect since 1996 or 1997. Most had funds on hand as of January 1, 2001. They conducted their reelection campaigns and did not spend the funds. She asked whether, under option 2 and Version C-Knox, they would be able to transfer

those pre-34 funds if they wanted to establish a committee for a different elective office. She believed that the intent of Proposition 34, when it was drafted, was to allow that transfer.

Ms. Fishburn agreed with Commissioner Downey's observation that people spend their money during an election. There may be situations where the funds will be carried over, but she believed those scenarios will be limited.

Commissioner Downey asked how much could be transferred, unattributed, to a current Treasurer campaign from a Senator who had $50,000 on January 1, 2001, then conducted a campaign and was reelected in November 2002. To do that under Version C-Knox, Commissioner Downey speculated that, as long as the balance of the fund did not dip below $50,000, then the entire $50,000 could be transferred unattributed.

Ms. Fishburn agreed.

Commissioner Downey commented that if the lowest balance dipped below $50,000, then the lowest balance of the fund could be transferred unattributed.

Ms. Fishburn noted that if the Senator set up a new committee on January 1, 2001 there would be no question. She believed that was consistent with the intent of the statute.

Commissioner Downey asked whether, if the expenditures that caused the scenario to dip below $50,000 were spent on officeholder expenses and not for the purpose of seeking elective office, it would cause a problem because only $40,000 could be transferred unattributed.

Ms. Fishburn noted that, under Version C-Knox, the money would be gone and could not be replaced.

Chairman Getman agreed.

Commissioner Swanson stated that she supported Version C-Knox because it seemed to make the most sense. She noted her initial concern that incumbents already had an advantage just by being incumbents and, when adding to that the possible additional funds they might have as a result of the transfer rules, it would make it almost impossible to defeat them. However, she now believes that it would be prudent to adopt Version C-Knox because the additional funds would be spent sooner than later.

Chairman Getman also supported Version C-Knox, noting that she might have supported Version C had the Commission dealt with the issue much earlier. She was also persuaded by the language of the statute that says that the candidate gets to use the funds to seek elective office. She agreed that the candidate should be able to choose when to use those funds.

Ms. Wardlow noted that the fact sheet ratified at the December 2002 meeting may need to be brought back to the Commission for change as a result of the decision.

Chairman Getman responded that, if problems are discovered on the fact sheet, the web site could be flagged to notify people that the advice may no longer be valid.

Chairman Getman moved adoption of Regulation 18530.2 Version C-Knox.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

The meeting adjourned at 3:35 p.m.

Dated: January 17, 2003.

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman